



# *Memorandum*

**TO:** HONORABLE MAYOR  
CITY COUNCIL

**FROM:** Richard Doyle  
City Attorney

**SUBJECT:** Proposed Ordinance to Amend  
Title 21 of the San José  
Municipal Code to Provide for  
Appeals to City Council of All  
Environmental Determinations  
Under CEQA

**DATE:** December 1, 2006

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Attached is a copy of the above- subject Proposed Ordinance to provide for appeals to City Council of all CEQA determinations. This Proposed Ordinance is set for the City Council consideration on Council's December 5, 2006 Agenda, under Item No. 11.2.

A draft of the Proposed Ordinance is attached hereto for your convenient reference. It is in underscored format to show language changes from the existing urgency ordinance on this matter that currently is in effect. No further substantive changes to this ordinance are anticipated, but non-substantive, language tightening clarifications may occur.

Richard Doyle  
City Attorney

By: \_\_\_\_\_  
Renee Gurza  
Sr. Deputy City Attorney

Attachment

**ORDINANCE NO. \_\_\_\_\_**

**AN ORDINANCE OF THE CITY OF SAN JOSE AMENDING  
CHAPTER 21.04 OF TITLE 21 OF THE SAN JOSE  
MUNICIPAL CODE TO ADD A NEW SECTION TO AND  
AMENDING SECTION 21.06.030 OF CHAPTER 21.06 OF  
TITLE 21 OF THE SAN JOSE MUNICIPAL CODE, ALL  
RELATED TO PROVIDING FOR APPEALS TO CITY  
COUNCIL OF ENVIRONMENTAL CLEARANCE  
DETERMINATIONS MADE PURSUANT TO TITLE 21 OF  
THE SAN JOSE MUNICIPAL CODE**

**WHEREAS**, this ordinance sets forth a process only and does not involve any change to or impact upon the physical environment such that this ordinance does not constitute a project under the provisions of the California Environmental Quality Act of 1970, as amended, those certain Guidelines for the California Environmental Quality Act of 1970 set forth in Title 14, Chapter 3 of the California Code of Regulations, as amended, nor Title 21 of the San José Municipal Code, as amended (collectively, “CEQA”); and

**WHEREAS**, on March 28, 2006, the City Council of the City of San José adopted an urgency ordinance, Ordinance No. 27686, to provide for certain appeals to City Council of determinations made by the Director of Planning or the Planning Commission under CEQA (the “Urgency Ordinance”); and

**WHEREAS**, on March 28, 2006 at the same public hearing where the City Council considered the Urgency Ordinance, the City Council adopted Resolution No. 73120 that initiated consideration of amendments to Title 21 of the San José Municipal Code to provide for certain appeals to City Council of determinations made by the Director of Planning or the Planning Commission under CEQA, directed staff to develop a proposed regular ordinance and referred the proposed ordinance to Planning Commission for its report and recommendation; and

**WHEREAS**, the Council direction in connection with this ordinance has been duly followed, the Planning Commission held a duly noticed and conducted public hearing on this ordinance on August 9 at which all interested persons were afforded an opportunity to provide testimony on this ordinance and the Planning Commission recommended approval of this ordinance; and

**WHEREAS**, on December 5, 2006, the City Council held a duly noticed and conducted public hearing on this ordinance at which all interested persons were afforded an opportunity to provide testimony on this ordinance.

**NOW, THEREFORE**, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF SAN JOSE:

**SECTION 1.** Part 2 of Chapter 21.04 of Title 21 of the San José Municipal Code is hereby amended by adding a new section to be numbered and entitled and to read in its entirety as follows:

**21.04.140    Appeals- General**

- A. Any determination regarding the appropriate environmental clearance for a project made by the Director or the Planning Commission may be appealed to the City Council or the Board of Directors of the Redevelopment Agency as set forth and described in this Section.
- B. Appeals of certifications of environmental impact reports shall follow and adhere to the procedures set forth in Chapter 21.07.
- C. Appeals of determinations on a negative declaration or a mitigated negative declaration shall follow and adhere to the provisions of Chapter 21.06.

- D. Appeals to City Council or Board of Directors of the Redevelopment Agency of environmental determinations that a project is not subject to CEQA or is exempt from CEQA under the provisions of CEQA or this Title shall follow and adhere to the provisions of this Section.
- E. Appeals of an environmental clearance determination allowed under this Section to the City Council or Board of Directors of the Redevelopment Agency shall proceed in accordance with and adhere to the following provisions and conditions:
  - 1. A person wishing to file a written appeal of a determination on environmental clearance with the Director under this Section shall file such appeal no later than 5:00 p.m. on the third (3<sup>rd</sup>) business day following the earliest to occur of the following events:
    - a. An initial action is taken on the environmental determination if that determination is made through or as a part of a public hearing; or
    - b. An initial action is taken after a public hearing on the project by an advisory-body making a recommendation on the project or a decision-making body making a decision on the project, whichever first occurs, which recommendation or decision relied upon the determination on environmental clearance at issue; or
    - c. Commencement of the project if the project is undertaken without any public hearing.
  - 2. The appeal shall be filed on a form prescribed by the Director. The appeal shall state with specificity the reasons that the environmental clearance

determination should be found not to be complete or not to have been prepared in compliance with the requirements of CEQA or this Title.

3. No appeal shall be considered unless it is based upon issues that were raised previously either orally or in writing to a recommending body or a decision-making body at or prior to a public hearing whenever the underlying project is considered at a public hearing.
4. The City Council shall conduct appeal hearings under this Chapter when the City is the lead agency.
5. The Board of Directors of the Redevelopment Agency shall conduct appeal hearings under this Chapter when the Redevelopment Agency is the lead agency.
6. Upon receipt of a timely appeal under this Section, the Director shall schedule a hearing and transmit a hearing notice for the appeal hearing before the City Council or the Board of Directors of the Redevelopment Agency, as appropriate, utilizing the processes and timelines set forth in Section 21.07.050.
7. The maker of the environmental decision being appealed shall prepare a report and recommendation on the appeal to the City Council or Board of Directors of the Redevelopment Agency, as appropriate, and such report shall be provided to the appellant, applicant, and adjacent property owner(s) in the same manner provided for hearing notices pursuant to provisions of Section 21.07.050.
8. The appeal hearing before the City Council or Board of Directors of the Redevelopment Agency under this Section shall be a hearing *de novo*.

9. The City Council or Board of Directors of the Redevelopment Agency may elect to hear an appeal of the environmental clearance determination with a public hearing on a related underlying project.
10. Upon the conclusion of the appeal hearing under this Section, the City Council or Board of Directors of the Redevelopment Agency, as appropriate, may find that the environmental clearance determination conforms to the requirements of CEQA and this Title or that the environmental clearance determination does not conform to the requirements of CEQA or this Title.
11. If the City Council or Board of Directors of the Redevelopment Agency, as appropriate, finds that the environmental clearance determination comports with CEQA and this Title, it shall uphold the environmental clearance determination and may then immediately take action upon the related project. If the City Council or Board of Directors of the Redevelopment Agency, as appropriate, finds that environmental clearance determination does not comport with CEQA and this Title, it shall require the Director to re-examine and process such environmental clearance determination and shall not take any approval actions on the related project.
12. All decisions of the City Council or the Board of Directors of the Redevelopment Agency under this Section shall be final.

**SECTION 2.** Section 21.06.010 of Chapter 21.06 of Title 21 of the San José Municipal Code is hereby amended to read in its entirety as follows:

**21.06.010     Consideration and approval of a negative declaration**

- A. The Director shall cause the preparation and circulation of each negative declaration or mitigated negative declaration in a manner that comports with the provisions of CEQA and this Chapter.
- B. The Director shall provide a negative declaration or mitigated negative declaration to the advisory body making a recommendation to the decisionmaking body on a project and to the decisionmaking body for a project, together with all comments received thereon and the Director's report on the negative declaration or mitigated negative declaration setting forth the Director's responses to comments received on the negative declaration or mitigated negative declaration.
- C. An advisory body to the decisionmaking body on a project shall consider the draft negative declaration or mitigated negative declaration, together with any comments received during the public review time period, and the Director's report thereon prior to making its recommendation on a project.
- D. The decisionmaking body on a project shall consider the draft negative declaration or mitigated negative declaration, together with any comments received during the public review time period, the Director's report thereon and any recommendation of an advisory body.
- E. The decisionmaking body shall adopt the negative declaration or mitigated negative declaration only if, on the basis of the initial study, any comments received, the Director's report and the balance of the entire record before it, the decisionmaking body determines that there is no substantial evidence that the project will have a significant effect on the environment and that the negative declaration or mitigated negative declaration otherwise conforms with CEQA. As alternatives to approving the negative declaration, the decisionmaking body may take any of the following actions:
  - 1. Require the preparation of an EIR by the project applicant.
  - 2. Require the draft negative declaration or mitigated negative declaration to be revised and undergo additional noticed public review.

3. Withdraw the draft negative declaration, if the project is withdrawn by the applicant.
- F. If within the noticed public review period for the negative declaration or mitigated negative declaration, the Director determines that a comment received raises an issue that would require recirculation of the negative declaration or mitigated negative declaration or would otherwise require substantial revision to the environmental analysis performed for a project, the Director may:
1. Require the preparation of an EIR by the project applicant and refund the filing fee to the protestant.
  2. Require the draft negative declaration to be revised and undergo additional noticed public review, and refund the filing fee to the protestant.
  3. Withdraw the draft negative declaration, if the project is withdrawn by the applicant, and refund the filing fee to the protestant.
- G. The negative declaration or mitigated negative declaration shall not become final unless and until the decisionmaking body adopts the negative declaration or mitigated negative declaration and all appeals set forth in this Chapter have been exhausted. .

**SECTION 3.** Section 21.06.020 of Chapter 21.06 of Title 21 of the San José Municipal Code is hereby amended to read in its entirety as follows:

**21.06.020     Appeals of adoption of a negative declaration or mitigated negative declaration**

- A. Any person may file a written appeal to the City Council or the Board of Directors of the Redevelopment Agency of the City of San José, as appropriate, of a



decisionmaker's decision to adopt a negative declaration or mitigated negative declaration in accordance with the provisions and conditions of this Section.

- B. Any person shall file such an appeal on a form prescribed by the Director no later than 5:00 p.m. on the third (3<sup>rd</sup>) business day following the earliest to occur of the following events:
1. The decisionmaker adopts a negative declaration or mitigated negative declaration during or as a part of a noticed public hearing; or
  2. An action is taken after a public hearing on a project by an advisory body making a recommendation on the project or a decisionmaking body making a decision on the project, whichever first occurs, which recommendation or decision relied upon the adoption of the negative declaration at issue and the adoption of the negative declaration or mitigated negative declaration did not occur as a part of a public hearing; or
  3. Commencement of the project if the project is undertaken without any public hearing.
- C. The appeal shall be filed on a form prescribed by the Director. The appeal shall state with specificity the reasons that the negative declaration or mitigated negative declaration should be found not to be complete or adequate or not to have been prepared in compliance with the requirements of CEQA or this Title.
- D. No appeal shall be considered unless it is based upon issues that were raised previously either orally or in writing to an advisory body or a decisionmaking body at or prior to a public hearing whenever the negative declaration or mitigated negative declaration or underlying project is considered at a public hearing.
- E. The Director shall schedule a hearing on the appeal before the City Council or Board of Directors of the Redevelopment Agency of the City of San José, as appropriate,

and shall give at least ten (10) days prior written notice thereof to the appellant, the applicant, and the owners of property contiguous to the project as shown on the latest equalized assessment roll adopted by the County of Santa Clara.

- F. No protest fee need be paid by a planning commissioner if three or more members of the planning commission, acting independently, file timely protests in compliance with this Section.

**SECTION 4.** Section 21.06.030 of Chapter 21.06 of Title 21 of the San José Municipal Code is hereby amended to read in its entirety as follows:

**21.06.030     Appeal Hearing Procedure**

- A. The City Council or Board of Directors of the Redevelopment Agency, as appropriate, shall hold a public hearing on an appeal of the adoption of a negative declaration or mitigated negative declaration to consider all relevant information and materials concerning whether the project may have a significant effect on the environment.
- B. The action of the City Council or Board of Directors of the Redevelopment Agency in considering the appeal is limited to environmental issues.
1. If the City Council or Board of Directors of the Redevelopment Agency finds that the project may have a significant effect on the environment, the Council or Board, as appropriate, shall require the preparation of an EIR in accordance with this Title prior to any consideration of whether the project should be approved. In such event, the Director shall thereafter refund the filing fee to the appellant.

2. If the City Council or Board of Directors of the Redevelopment Agency, as appropriate, upholds the action to adopt the negative declaration or mitigated negative declaration, the negative declaration or mitigated negative declaration shall become final.

**PASSED FOR PUBLICATION** of title this \_\_\_\_\_ day of \_\_\_\_\_, 2006, by the following vote:

AYES:

NOES:

ABSENT:

DISQUALIFIED:

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RON GONZALES  
Mayor

ATTEST:

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LEE PRICE, MMC  
City Clerk